

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SOCIAL SECURITY ADMINISTRATION,)
DEPARTMENT OF HEALTH AND HUMAN)
SERVICES,)

Complainant)

v.)

JAMES L. DAVIS,)
ADMINISTRATIVE LAW JUDGE,)

Respondent)

DOCKET NO. HQ75218210026

FINAL DECISION

This adverse action proceeding was initiated by the complainant, Department of Health and Human Services, pursuant to 5 U.S.C. § 7521.1/ It seeks to have the respondent, James L. Davis, removed from his position as an administrative law judge in the Office of Hearings and Appeals (OHA) of the Social Security Administration (SSA).2/

1/ Title 5 U.S.C. § 7521(a) provides:

(a) an action may be taken against an administrative law judge appointed under section 2105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

2/ The respondent, who is assigned to the Birmingham, Alabama Office of OHA, has been an administrative law judge since 1977.

The agency has charged that respondent's lewd and lascivious behavior constitutes good cause to remove him from his position. The salacious remarks of the respondent which form the basis for the agency's charges, and which were directed at female employees of the agency, are described in detail in the annexed Recommended Decision which we adopt except as modified herein.

A hearing was held before Judge McCarthy, the Board's Chief Administrative Law Judge, who found that the agency had proven the alleged facts. He then concluded that a rational nexus existed between the proven charge and the efficiency of service warranting respondent's removal. Specifically, Judge McCarthy found that respondent's comments had a significant adverse impact on his office and upon the female employees to whom they were directed and that respondent's behavior was vulgar, base and offensive to men and women.

Respondent filed timely exceptions which object to many of the Recommended Decision's credibility determinations and factual conclusions.^{3/} We have reviewed the record and have determined

^{3/} The respondent also requested oral argument, which is hereby denied.

that Judge McCarthy's factual findings as to the relevant charges are well-supported and correct.4/

Respondent also urges us to reject the Recommended Decision's ultimate legal conclusion. The Recommended Decision holds that good cause, pursuant to 5 U.S.C. § 7521, was established because of the nexus which exists between the proven charge and the efficiency of the service. We hold today in Social Security Administration v. Goodman, MSPB Docket No. HQ75218210015, that the good cause standard is not equivalent to the efficiency of the service standard which governs other chapter 75 adverse actions. While traditional adverse action cases may provide guidance in deciding section 7521 cases, the efficiency of the service standard is not imputed into the good cause standard.
Moreover, while there may be specific fact situations which would satisfy both standards, the standards are distinct and different.

4/ We disagree, however, that the sexually offensive statement at an office holiday celebration in a public restaurant was on-duty conduct. This statement was not made during working hours or at the place of employment and was, therefore, not made on duty. The Recommended Decision's characterization of the comment does not affect our result.

If this case were judged by the efficiency of the service standard, there is no doubt that respondent's removal would be warranted. Snipes v. U.S. Postal Service, 677 F.2d 375 (4th Cir. 1982). However, in order to authorize removal here we must first conclude that, on this record, respondent's conduct similarly warranted removal under the good cause standard. We find that it does. The respondent's objectionable behavior directed at agency employees, which disrupted the work place, and which grossly offended co-workers in respondent's office, violated generally accepted rules of conduct. Moreover, such offensive behavior committed by an administrative law judge is inconsistent with a major purpose of the Administrative Procedure Act in that it undermines confidence in the administrative adjudicatory process. As we stated in an earlier adverse action proceeding under section 7521,

Honesty, integrity and other essential attributes of good moral character are foremost among the qualities that lawyers, and, especially, judges ought to possess if public confidence in the legal profession and the judiciary is to be promoted and preserved.

In re Spielman, 1 MSPB 51, 56 (1979). Proof of generally offensive lewd and lascivious behavior which has a disruptive effect on the work place and which tends to erode confidence in the administrative adjudicatory process constitutes good cause to take an adverse action against an administrative law judge.

In addition to objecting to the Recommended Decision's findings and legal conclusions, respondent urges us to remand this case for a consideration of new and material evidence dealing with his rehabilitative efforts. This request places an unwarranted reliance upon a single statement contained in the Recommended Decision and is based upon a misreading of our decisions relating to penalty selection.

In seeking a remand, the respondent contends that the Recommended Decision did not give equal weight to each of the twelve factors which we have identified as appropriate for consideration in selecting a penalty. Douglas v. Veterans Administration, 5 MSPB 313 (1981).^{5/} While these factors are generally recognized as relevant to the issue of penalty selection, "[n]ot all of the factors will be pertinent in every case. . . ." Id. at 332. We have not required that each and every factor be considered. We have only required that the penalty selected be reasonable when considered against the relevant factors. Nagel v. Department of Health and Human Services, 707 F.2d 1384 (Fed. Cir. 1983).

^{5/} Douglas deals with penalty selection and mitigation in traditional adverse action cases which are governed by the efficiency of the service standard. The considerations it details for selecting a penalty are equally appropriate, however, to section 7521 cases where it is this Board, rather than the employing agency, which selects the appropriate penalty. Social Security Administration v. Arterberry, MSPB Docket No. HQ75218210009 (May 31, 1983), aff'd, No. 83-1202 (Fed. Cir. Jan. 6, 1984).

Respondent contends, however, that removal is never warranted where clear evidence of rehabilitation is provided. In pressing this contention, respondent relies upon a statement to that effect in the Recommended Decision which cites to In re Spielman, supra. This reliance on the holding in Spielman is unwarranted. In that case, the respondent was suspended for 60 days as a result of his repeated falsifications on employment applications. The agency's request for that penalty, rather than a more serious penalty, was acceded to despite the fact that we found in the adopted Recommended Decision that removal would have been warranted. The Recommended Decision, in that case, discussed the agency's reasons for not seeking removal, one of which was the existence of evidence of rehabilitation. It overreads Spielman, however, to contend that it stands for the premise that removal can never be warranted where evidence of rehabilitation exists since rehabilitation is just one of the factors to be considered. There is, therefore, no legal reason which requires a remand in order to consider respondent's evidence concerning rehabilitation.

In addition, most of that evidence concerned a matter not in issue. The respondent tendered numerous affidavits from persons attesting to his improved behavior on the bench. These affidavits rebut an unasserted charge. Moreover, even if the relevant evidence concerning rehabilitative efforts were to be

considered, given the nature of respondent's position and the seriousness of respondent's offense and its effect upon the office, we would still conclude, on the facts of this case, that removal was warranted.

The Board has determined that on this record good cause exists to discipline respondent and that removal is the appropriate penalty. Accordingly, the Board ~~ADOPTS~~ the Recommended Decision AS MODIFIED and CONCLUDES that respondent MAY BE REMOVED.

This is the final decision of the Merit Systems Protection Board. The respondent administrative law judge is hereby notified of the right to seek judicial review of the Board's action as provided in 5 U.S.C. § 7703.

FEB 6 1984

(Date)

Robert E. Ellingwood

Maria L. Johnson

Dennis M. Devaney